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ONE HUNDRED SIXTH CONGRESS

# Congress of the United States

## House of Representatives

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May 31, 2000

### BY FACSIMILE

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David W. Ogden, Esq.  
Acting Assistant Attorney General  
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10th Street and Constitution Avenue, N.W.  
Washington, D.C. 20530

Dear Messrs. Moss and Ogden:

I am writing to bring to your attention two Department of Labor (DOL) pending final rulemakings which, I believe, are defective.

First, DOL's regulatory proposal to use unemployment compensation for paid family leave seems to me to be backdoor legislating. As a consequence, on May 18, 2000 and May 31st, I wrote Office of Management and Budget Director Jack Lew and DOL Secretary Alexis Herman, respectively, to object to DOL's pending final rule, entitled "Birth and Adoption Unemployment Compensation" (popularly known as "Baby UI"). Copies of my letters are enclosed. In light of the Supreme Court's decision in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.* (120 S.Ct. 1291), and pursuant to the Constitution and Rules X and XI of the United States House of Representatives, I request that the Department of Justice (DOJ) provide a legal opinion of its ability to defend the Administration's proposed major revision of unemployment compensation against a claim of usurpation of legislative authority, which is solely granted to Congress under Article I of the Constitution.

Second, the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, which I chair, is investigating possible augmentation of DOL full-time equivalents by use of contractors and improper use of contractors for inherently governmental functions in the rulemaking process. As part of this investigation, on May 10, 2000, I wrote Secretary Herman for information about its contract awards for its ergonomics rulemaking. On May 10th, I also wrote one of DOL's contractors for its ergonomics rulemaking. Copies of my letters are enclosed. On May 26th, DOL provided a listing of 70 contracts awarded from 1996 to 2000 for this rulemaking, including 41 non-competitive awards and 28 awards for individuals to

testify at DOL's rulemaking hearings. Pursuant to the Constitution and Rules X and XI of the United States House of Representatives, I request that DOJ provide a legal opinion of the propriety of DOL's use of contractors for what may be inherently governmental functions related to this rulemaking, DOL's use of paid witnesses in its rulemaking hearings, and DOL's use of noncompetitive contracting for noncommercial functions related to its rulemakings.

Please provide both legal analyses before finalization of these rules. If you have any questions about this letter, please contact Professional Staff Member Barbara Kahlow at 226-3058 or Subcommittee Counsel Bill Waller on 226-2067.

Sincerely,

A handwritten signature in black ink, reading "David McIntosh". The signature is written in a cursive, flowing style.

David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs

Enclosures

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich